Supreme Court, U. S.
FILED
NOV 28 1975
MICHAEL RODAK, JR., CLERK

No. 75-320

In the Supreme Court of the United States

OCTOBER TERM, 1975

BRANIFF AIRWAYS, INC., PETITIONER

v.

EL PASO COIN COMPANY, INC. AND
CONTINENTAL AIRLINES, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE EIGHTH SUPREME JUDICIAL DISTRICT OF TEXAS

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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The United States submits this memorandum as *amicus curiae* in response to this Court's invitation of October 20, 1975.

1. On December 18, 1972, El Paso Coin Company tendered three cans containing gold coins to Continental Airlines at El Paso, Texas, for shipment to La Guardia Airport, New York. An airbill placed on each can of coins in a clear plastic envelope described the shipment as "one can coin" and declared the value of the shipment to be $26,625.00 (Pet. App. A-1, A-2). Continental delivered the coins to Braniff Airways at Dallas, Texas, and Braniff agreed to deliver the coins to La Guardia Airport (*id.* at A-2, A-3). Because no additional flights to La Guardia were scheduled for that day, Braniff altered the destination to Kennedy

Airport. Braniff's flight manager at Kennedy received two of the cans and properly delivered them. The third can of coins could not be found by Braniff (*id.* at A-4).

The District Court of El Paso County held that Braniff was negligent both in changing the routing of the shipment from La Guardia Airport to Kennedy Airport and in failing to deliver the shipment to the consignee (*id.* at A-5). Rejecting the carriers' argument that their air carrier tariffs, which had been filed pursuant to federal law, required advance arrangements on shipments of extraordinary value as a condition precedent to holding the carriers liable, the court held that both carriers waived the tariffs in two ways: (1) by accepting the cans of coins with the airbills in plain view, and (2) by a prior course of conduct, pursuant to which Continental had on various occasions shipped cans of coins for the El Paso Coin Company to New York, through Dallas and by Braniff, without advance arrangements (*ibid.*). The court entered judgment in the amount of $26,625 jointly and severally against Continental and Braniff. Continental paid the judgment and was awarded a judgment against Braniff, which appealed.

The Court of Civil Appeals affirmed, recognizing that federal law controls but concluding that "there is no Federal regulation setting out the rights and liabilities between shipper and carrier and connecting carriers nor is it spelled out in the tariffs" (Pet. App. B-2). Accordingly, the court turned to the Texas Uniform Commercial Code. The court held that under the Uniform Commercial Code Braniff was liable for the loss of the coins. The court conceded that a contrary provision in the tariff might have been dispositive, but it held that the tariff as actually written did not support Braniff's position (*id.* at B-4). Finally, addressing Braniff's argument that provisions in the tariff may not be waived, the court concluded that the

question was academic because Braniff had not established that the sole proximate cause of the loss was the failure of either El Paso Coin or Continental to make advance arrangements for shipment of the coins (*id.* at B-5).

2. Petitioner contends that disputes concerning the rights and liabilities of shippers and carriers in interstate air freight transactions must be resolved by applying federal law and that, under federal law (which, it contends, is embodied in its tariff), it cannot be held liable. Although the United States supports petitioner's argument that tariffs supersede inconsistent provisions of state or local law,[1] this case does not require decision upon that argument. The Texas Court of Civil Appeals acknowledged that the tariffs would prevail to the extent they were inconsistent with state law, and held only that there was no inconsistency.

Braniff relies upon Tariff Rule 23(B). That rule provides (Pet. App. D-2) that articles of extraordinary value "will be accepted for transportation provided that * * * advance arrangements are made for the shipment." The rule has two effects: (1) it entitles an air carrier to refuse to accept the shipment if no advance notice is given, and (2) it requires the carrier to accept the shipment if the advance notice is given. In order for Braniff to prevail, the rule would be required to have still a third effect: it would have to *forbid* the air carrier to accept the shipment in the absence of advance notice. But the language of the rule will not bear such a construction. Nor is such a construction suppported by what we understand to be the purpose of the rule—to give the air carrier time to take precautions against loss when it believes such precautions justified. Since the rule does not forbid a carrier to accept a shipment without advance notice, Continental's and Braniff's employees did not violate the tariff by their actions.

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[1]See, *e.g.*, *Blair* v. *Delta Air Lines, Inc.*, 344 F. Supp. 360 (S.D. Fla.), affirmed *per curiam*, 477 F.2d 564 (C.A. 5).

Moreover, Braniff did not establish that a violation of Rule 23(B) would relieve it from liability to the shipper. Tariff Rule 30(B) (1) (b) provides (Pet. App. D-2) that a carrier is not liable for loss "if it proves that it and its agents have taken all necessary measures to avoid the damage or that it was impossible for the carrier or its agents to take such measures." And Rule 30(B) (1) (c) provides (Pet. App. D-3) that "[t]he carrier shall not be liable for damage caused by the act or default of the consignor or the consignee." These rules—not Tariff Rule 23 (B)—establish the limits upon Braniff's liability, and the Texas courts were entitled to conclude that Braniff had not taken the necessary precautions or shown that the loss was caused by either the consignor or the consignee.

Accordingly, the result reached by the lower courts is consistent with Braniff's liability under its tariffs. The question stated in the petition is not properly presented on the facts of this case. Although the Texas courts should have looked initially to Tariff Rule 30 rather than to the Uniform Commercial Code, Braniff has not been prejudiced by any error the courts may have committed.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1975.

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[2]Resolution of the question whether tariffs preempt state law would also be premature, because the Civil Aeronautics Board is now conducting a full scale investigation of the air carriers' tariff rules relating to liability and claims. *Liability and Claim Rules and Practices Investigation*, Docket 19923.

DOJ-1975-11